IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8756 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SHANKARJI HALIYAJI

Versus

KISHANLAL S KALAL

Appearance:

MR VIKRAM J THAKOR for MR MC BHATT for Petitioners

MR KV SHELAT for Respondent No. 1

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 12/01/2001

ORAL JUDGEMENT

1. In this Special Civil Application which is filed under Article 226 of the Constitution petitioners challenge four identical orders dated December 6, 1989, Annexures E-1 to E-4, passed by the Small Causes Court (No.7), Ahmedabad, below Ex.1 of Distress Warrant Application Nos. 439 of 1989, 440, 1989, 441 of 1989 and

442 of 1989 by which the applications for issuance of Distress Warrant filed by the respondent herein are allowed and the respondent was held to be entitled to recover the arrears of rent from the petitioners herein.

2. The petitioners claim to be the owner of the huts which they have erected on Revenue S.No. 518 of Wadaj of Ahmedabad City, which was a Government Kharaba land. The respondent alleged that he was the landlord of the said land and erected the huts thereon and thereafter he gave the said huts to the petitioners on monthly rent basis and, therefore, the petitioners were his tenants. According to the respondent, the petitioners failed to pay the arrears of rent for the alleged lease granted to the petitioners and, therefore, the respondent instituted four separate Distress Warrant Applications bearing Application Nos. 439 of 1989 to 442 of 1989 against the petitioners for issuance of Distress Warrant as envisaged under section 53 of the Presidency Small Cause Courts Act, 1882 ('hereinafter referred to as 'the Act' for short). The respondent alleged in the said applications that the petitioners were his tenant and the petitioners were irregular in paying the rent. Therefore, to recover the said rent, necessary orders under Section 53 of the Act may be issued against the petitioners by issuing Distress Warrant.

3. The Distress Warrant Applications were resisted by the petitioners by filing written objections, inter alia, contending that the respondent was neither the owner of the land on which the huts were erected nor the owner of the huts wherein the petitioners were residing. It was further admitted by the petitioners that the Revenue Survey No. 518 was a Government Kharaba land and at the relevant time occupied by Ahmedabad Municipal Corporation on lease hold rights and by encroaching upon the said land the petitioners had erected huts by way of illegal construction. However, the respondent tried to get the rent from the petitioners by adopting high-handed actions and taking law in his hands and the respondent had obtained Distress Warrant against some other persons also by claiming his ownership right by misguiding the Court. It was, therefore, prayed to dismiss the applications.

4. The learned Small Causes Judge on appreciation and evaluation of the pleadings of the parties and the documentary evidence, came to the conclusion that the respondent was the owner of the land as well as the huts and held that the respondent was the landlord whereas the petitioners were tenants and, therefore, the respondent

was entitled to recover the amount of rent from them and consequently issued the Distress Warrant against the petitioners which has given rise to this petition wherein prayer is made to issue a writ of certiorari or any other order or direction quashing or setting aside the orders Annexures E-1 to E-4.

5. Mr. Vikram J Thakore, learned counsel for the petitioners, contended that there is overwhelming evidence to support that the respondent was never the landlord of the Government Kharaba land upon which the petitioners had erected structure at their own costs though, of course, they have encroached upon the Government land and without obtaining permission from the owner thereof huts were constructed. What was stressed by the learned counsel for the petitioners was that the learned Small Causes Judge has misread the document marks 10/1 to 10/10 and 3/1 which were ex-parte judgments rendered by the City Civil Court, Ahmedabad in favour of the respondent wherein the respondent was declared as landlord in respect of some other persons as against the documents Ex.13/1 and 13/2 which are village form 7-12 issued by the Talati of Wadaj which are more reliable and trustworthy. It was emphatically submitted by the learned counsel for the petitioners that scope of section 53 of the Act is very limited and can be invoked where there is no dispute with regard to the title of the landlord. In the instant case the petitioners have categorically disputed the title of the respondent as the landlord notwithstanding that the learned Small Causes Judge has decided the title of the landlord in favour of the respondent which is ex facie erroneous and thereby committed jurisdictional error which can be corrected by this Court in exercise of powers under Article 226 of the constitution. Lastly the learned counsel contended that since the jurisdictional error has been committed, this petition may be allowed by quashing and setting aside the impugned order of issuance of distress warrant passed by the learned Small Causes Judge.

6. Though the respondent is duly served, no reply affidavit has been filed. It may be stated that on behalf of the respondent though Mr. K.V. Shelat, learned advocate has filed Vakalatnama he has not appeared at the time of hearing of this petition.

7. I have considered the submission advanced by Mr. Vikram Thakore, learned counsel for the petitioners and documents forming part of the petition.

8. There is no manner of doubt that the petitioners

encroached upon the Government kharaba land bearing revenue S. No. 518 of Wadaj, Ahmedabad City and erected the huts thereon wherein they were residing. The respondent had filed four separate applications envisaged under section 53 of the Act claiming to be the landlord of the land as well as the huts erected thereon which according to the respondent was let out by him to the petitioners. The respondent had filed rejoinder in the said Distress Warrant Applications wherein in para 4 he has categorically admitted that the land on which the huts were erected was of Government kharaba land but since he has erected the huts thereon he was entitled to collect the rent from the occupiers of the huts.

9. In view of the rival pleadings of the parties and inspite of clear evidence to the effect that the land belonged to Government and there was a dispute with respect to the erection of huts the learned Small Causes Judge has decided the title of the said huts merely on the basis of the documentary evidence mark 10/1 to 10/10 and 3/1. Mark 10/1 to 10/10 which is ex-parte judgments delivered by the City Civil Court, Ahmedabad on the suits filed by the respondent against some other tenants wherein the City Civil Court has decided that the respondent was the landlord qua the occupiers of that premises in question in respect of those suits which according to me has no bearing for deciding the issue before the learned Small Causes Judge. When there was a clear admission on the part of the respondent that on Government kharaba land he has erected the huts and the petitioners have also contended that they have erected huts, there was a disputed question of fact with respect to the ownership of the huts and it is an admitted position that under Section 53 of the Act when there is a dispute with respect to the title of the property and the tenant challenges the title of the landlord the application under Section 53 of the Act is not maintainable.

10. At this stage it would be profitable to refer to Section 53 of the Act which reads as under:

> "53. Application for distress-warrant.-- Any person claiming to be entitled to arrears of rent of any house or premises to which this Chapter extends, or his duly constituted attorney, may apply to any Judge of the Small Cause Court, or to the Registrar of the Small Cause Court, for such warrant as is hereinafter mentioned.
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> The application shall be supported by an

affidavit or affirmation to the effect of the form (marked A) in the third schedule hereto annexed."

11. On having bare look upon the said section it is abundantly clear that when any person claiming to be entitled to arrears of rent of any house or premises to which this Chapter extends, or his duly constituted attorney, may apply to any Judge of the Small Cause Court, or to the Registrar of the Small Cause Court, for such warrant as is hereinafter mentioned. In other words, person who seeks distress warrant must establish that he is entitled to arrears of rent meaning thereby he has a right to collect the rent or to put it differently he is the landlord of the said premises.

12. In the case of Deviben v. Motiram, 20 GLR 875, this Court has held that if petitioners have a suitable remedy open to them to file the suits under Section 18 of the Presidency Small Causes Court Act, or section 28 of the Bombay Rent Act for the purpose of realising the rent, and in such suits, the question of title can also be incidentally gone into as per the legal provision, namely, section 29 of the Bombay Rent Act. It was further held that distress proceedings which were initiated ex parte and which are ex facie of the summary character, cannot be said to be proper proceedings for dealing with contentious questions like the one that has been raging in this litigation. If highly complex and highly contested questions are raised the Small Causes Court, exercising powers under Sec. 53 would certainly be not a proper forum to deal with such a hotly debated question.

13. In the case of Minor Manojkumar Sureshchandra Sharma v. Rambharose Mithalal, 35 (2) GLR 1423 a similar question arose before this Court. It was held that the distress is a common law remedy and is available only to a person claiming to be entitled to arrears of rent i.e., a landlord against his tenant by virtue of provision in that behalf made in Chapter VIII of the Rent Act. Section 53 of the Presidency Small Causes Courts Act, 1882 means contractual rent and the person entitled to rent at common law is the landlord. Section 53 of the Act lays down that the application under the said provision shall be supported by an affidavit or affirmation as provided in the Form marked 'A' in Third Schedule to the Act. A bare reading of Form 'A' in Third Schedule makes it clear that the applicant has to aver that the person against whom distress is sought to be levied is justly indebted to him for the specified amount

of the arrears of rent. The Small Causes Court procedure for distress under Chapter VIII of the Act is a summary remedy by which a person seeks an immediate relief to take into his possession the movable of any person to be held almost as a pledge or compel the performance of the satisfaction of a debt, namely, arrears of rent but the said debt, however, must be a debt and not a mere pretence to cover controversial question of title. The procedure is a summary one because it starts ex-parte on a mere sworn affidavit which only asserts as its foundation a debt, i.e., arrears of rent. Because it is ex-parte in the first instance, it is all the more essential for the Court to examine the objections when they are made. This summary procedure is not, however, available when the matter involves highly complex question of title, etc. If there is a pending dispute between a landlord and a tenant in regard to the rent which the tenant is liable to pay to the landlord, no distress warrant can be issued and levied for recovery of the rent.

14. In view of the aforesaid discussion and more particularly the statutory provisions envisaged under Section 53 of the Act and the two pronouncements made by this Court referred to in para supra, there is no manner of doubt that the provisions of section 53 of the Act is a summary one and when dispute is raised with respect to the title of the property, Court exercising powers under Section 53 of the Act cannot issue distress warrant against the so-called tenant. The learned Small Causes Judge has committed grave jurisdictional error in deciding the applications which can be challenged before appropriate forum.

15. It is true that there is a remedy provided against the issuance of distress warrant under the Act. The petitioners have not available of that remedy. But that fact itself is not sufficient to throw away this petition when there is a jurisdictional error committed by the learned Small Causes Judge.

16. In the case of D.S. Vasavada v. Chief Inspector, 1985 GLH 623 this Court has held as under:

> "It is well settled that merely because an alternative remedy was available, is no ground to reject the petition. Availability of alternative remedy is no bar to exercise of power conferred on this Court under Article 226. Having dealt with the question on merits, it would not be proper to deny the relief merely on the ground

> that alternative remedies were available. One of the reliefs which is sought by employees, is that the Chief Inspector should be directed to implement and enforce the provisions of section 31. Contravention of Section 31 is offence under Section 52; and the employers are liable to be prosecuted. One of the steps which the Chief Inspector can take to enforce the provisions of Section 31 is by launching prosecution against the defaulting employers. The directions which the employees have sought against the Chief Inspector could not have been given in the alternative remedies."

17. In the case of L. Hirday Narain v. Income-Tax Officer, AIR 1971 SC 33, the Supreme Court has held that where the petitioner files a writ petition instead of availing of statutory remedy and the High Court entertains the petition and gives hearing on merits the petition cannot thereafter be rejected on the ground that statutory remedy was not availed of.

18. Applying the aforesaid two principles, though statutory remedy under the Act is available in favour of the petitioners, as the petition was admitted long back in 1989, it would not be proper for this Court to relegate the petitioners to avail of the alternative remedy.

19. Seen in the above context, the impugned order at Annexures E-1 to E-4 recorded by the Small Causes Court (No.7), Ahmedabad, wherein distress warrants came to be issued on the applications submitted by the respondent against the petitioners were beyond the scope of jurisdiction under Section 53 of the Act since there was a dispute with regard to the respondent being landlord and also who had constructed the huts wherein the petitioners were residing. Therefore, there is a jurisdictional error committed by the learned Small Causes Judge and, therefore, all the four impugned orders are liable to be quashed and set aside in exercise of powers of this Court conferred under Article 226 of the Constitution.

20. For the foregoing reasons, the petition succeeds and accordingly it is allowed. The orders at Annexures E-1 to E-4 are quashed and set aide. Rule is made absolute with no order as to costs.

12.1.2001. (A. M. Kapadia, J.)

(karan)